

November 7, 2008

**Mark L. Gray** *Executive Director*

Chris Spruce, Chair  
Legislative Subcommittee  
Right to Know Advisory Committee

RE: Release of reasons for decision to deny, revoke, suspend or  
reinstate education credentials

Dear Mr. Spruce:

Thank you for your kind invitation to offer MEA's position on the  
question of releasing information about the reasons for disciplinary  
action, while otherwise observing confidentiality of those investigations.

We believe it would be instructive to compare the Freedom of  
Access Law with the provisions of the Education Statutes, as they  
currently apply both to the confidentiality of employee records in schools,  
and to the certification records of the Department of Education.

Title 1, M.R.S.A. §407(2) recites that:

**2. Dismissal or refusal to renew contract.** Every agency shall make a written record of every decision involving the dismissal or the refusal to renew the contract of any public official, employee or appointee. The agency shall, except in case of probationary employees, set forth in the record the reason or reasons for its decision and make findings of fact, in writing, sufficient to appraise the individual concerned and any interested member of the public of the basis for the decision. A written record or a copy thereof shall be kept by the agency and made available to any interested member of the public who may wish to review it.

Please note that such disclosure is specifically limited to "dismissal or the refusal to renew the contract" of public employees, including the reasons and factual basis therefor. Lesser forms of discipline, such as reprimands, suspensions, demotions, or reductions in compensation are not intended to become public records. The public interest in the details of such matters appears to be limited to *termination* of employment.

Title 20-A, M.R.S.A. §6101(2) designates as confidential the following records as maintained by school administrative units:

(6) Complaints, charges of misconduct, replies to complaints and charges of misconduct and memoranda and other materials pertaining to disciplinary action;

But the following exception also applies to school employees:

C. Any written record of a decision involving disciplinary action taken with respect to an employee by the governing body of the school administrative unit shall not be included within any category of confidential information set forth in paragraph B.

That is because, at least with respect to teachers under contract, only the “governing body”—the local school board—may terminate employment. That decision generally takes the form of nonrenewal or dismissal. Nonrenewal is governed by Title 20-A, M.R.S.A. §13201:

After a probationary period of 2 years, any teacher, who receives notice in accordance with this section that his or her contract is not going to be renewed, may during the 15 days following such notification request a hearing with the school board. The teacher may request reasons. The hearing shall be private except by mutual consent and except that either or both parties may be represented by counsel. That hearing must be granted within 30 days of the receipt of the teacher's request.

Dismissal is governed by Title 20-A, M.R.S.A. §13202:

A school board, after investigation, due notice of hearing and hearing thereon, shall dismiss any teacher, although having the requisite certificate, who proves unfit to teach or whose services the board deems unprofitable to the school; and give to that teacher a certificate of dismissal and of the reasons for the dismissal, a copy of which the board shall retain. That dismissal shall not deprive the teacher of compensation for previous services.

Accordingly, “memoranda and other materials pertaining to disciplinary action” which is *not* taken by the governing body, such as discipline *other than* dismissal or nonrenewal, must remain confidential.

Similarly, the Department is required to observe the following under Title 20-A, M.R.S.A. §13004:

**2-A. Complaints confidential.** Complaints, charges or accusations made and investigated pursuant to section 13001, replies to those complaints, charges or accusations, and any other information or materials that may result in action to deny, revoke or suspend certification shall be confidential. Any charges or information filed by the commissioner with the District Court in support of a petition to revoke or suspend certification and any decision of the court shall be public records.

Notice that an essential distinction continues to apply between the public disclosure of serious disciplinary action on education credentials, and the obligation of maintaining the confidentiality of lesser actions.

Under current law, only information filed by the Department "in support of a petition to revoke or suspend certification and any decision of the [District] court" can be public records; while "any other information or materials that may result in action to deny, revoke or suspend certification" must remain confidential.

Therefore, it is entirely consistent with the policy embodied in the Right to Know Law, and the parallel confidentiality exceptions which apply to school administrative units, that the reasons for lesser disciplinary actions should not be publicly disclosed by the Department.

The intuitive rationale for this distinction should be apparent: Public employees who are terminated may have committed more serious offenses than other employees who are disciplined, but still kept on. If lesser disciplinary records are publicized, those educators may be unfairly stigmatized or publicly denounced to the degree that their services are deemed "unprofitable", and may ultimately be terminated.

So, with respect to the Subcommittee's consideration of whether the Department should disclose reasons for discipline, other than via a court action for suspension or revocation, MEA urges that no changes be made in the 11/17/08 DRAFT PROPOSAL, except for the following:

D. The department shall report all denials, revocations, suspensions, surrenders and reinstatements of certification that are not under appeal or still subject to appeal to a national association of state directors of teacher education and certification within 30 days of the action, *including the grounds for the action taken*. In reports to the national association of state directors of teacher education and certification, the department may not *otherwise* disclose any information designated in *paragraph A* as confidential..

Allowing this limited disclosure, *only* to the national clearinghouse, of the "grounds for the action taken" is consistent with Section V(E) of the Interstate Educator Certification/Licensure Agreement between NASDTEC and the Department. It will assist other jurisdictions in enforcing their comparable standards, without unfair disclosure at home.

Sincerely,

A handwritten signature in dark ink, appearing to read "Shawn C. Keenan", with a stylized flourish at the end.

Shawn C. Keenan  
General Counsel